

P L D 2023 Supreme Court 406

Present: Umar Ata Bandial, C.J., Ijaz ul Ahsan and Munib Akhtar, JJ

MOHAMMAD SIBTAIN KHAN and others---Petitioners

Versus

ELECTION COMMISSION OF PAKISTAN through Chief Election Commissioner, Islamabad and others---Respondents

Constitution Petition No.5 of 2023, decided on 4th April, 2023.

(Re: setting aside order dated 22.03.2023 passed by the Election Commission of Pakistan being ultra vires the Constitution).

Constitution of Pakistan---

---Arts. 148(3), 218(3), 220, 224(2), 243(1) & 184(3)---Elections Act (XXXIII of 2017), S.57(2)---Election Commission, powers of---Scope---Constitutional petition challenging order passed by Election Commission delaying elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Neither the Constitution nor the law empowers the Election Commission ('the Commission') to extend the date of elections beyond the 90 days period as provided in Article 224(2) of the Constitution---Impugned order ("EC Order") made by the Commission was declared to be unconstitutional, without lawful authority or jurisdiction, void ab initio, of no legal effect and was resultantly quashed---Election Programme notified by the Commission under Section 57(2) of the Elections Act, 2017 on 08.03.2023 (vide Notification No. F.2(3)/2023-Cord.) for the general election to the Punjab Assembly was revived and restored immediately with certain modifications---Directions issued by the Supreme Court to the relevant State functionaries to ensure timely elections, and modifications to the Election Programme (for Punjab) made by the Supreme Court stated.

The Election Programme (for Punjab) in relation to the last five stages (ending with polling day) shall stand modified with the consequence that the polling day perform must be shifted, and moved forward from 30.04.2023 to 14.05.2023.

The Federal Government shall forthwith and in any case by 10.04.2023 release and provide to the Commission funds in the sum of Rs. 21 Billion for purposes of the general elections to the Punjab and Khyber Pakhtunkhwa (KPK) Assemblies. The Commission shall, by 11.04.2023, file a report in the Court stating whether the said funds have been provided and received and if so, whether in full or in part. The report shall be placed before the members of the Bench for consideration in Chambers. If the funds have not been provided or there is a shortfall, as the case may be, the Court may make such orders and give such directions as are deemed appropriate to such person or authority as necessary in this regard. The Election Commission ('the Commission') shall be entitled to utilize the funds in the first instance for the

purposes of the general election to the Punjab Assembly. If there is thereafter a shortfall for purposes of the general election to the KPK Assembly, the Commission

may make an appropriate representation to the Supreme Court for such consideration and orders as deemed appropriate.

The caretaker Cabinet that constitutes the Government of Punjab and, in particular, the Chief Secretary and the Inspector General Police of that Province must forthwith, and not later than 10.04.2023, provide a plan acceptable to the Commission for, inter alia, providing sufficient personnel for election-duty and security purposes for the holding of the general election. Furthermore, and in any case, the Government of Punjab and all officials thereof must, in discharge of constitutional and legal duties and responsibilities, proactively provide all aid and assistance to the Commission for the holding and conduct of the general election.

The Federal Government must, in exercise of its powers and position in terms of Article 243(1) of the Constitution, and all other constitutional and legal powers enabling it in that behalf, and in discharge of its constitutional duties under Articles 148(3) and 220, provide all such aid and assistance to the Commission as required by it for the holding and conduct of the general elections to the Punjab and KPK Assemblies. The Federal Government must make available all necessary personnel, whether from the Armed Forces, Rangers, Frontier Constabulary and all other forces under the direct, indirect or ultimate command and control of the said Government, as are required by the Commission for security and other purposes related to the general elections. In this regard, the Federal Government must forthwith, and not later than 17.04.2023, provide a plan acceptable to the Commission.

If there is a failure by the Federal Government or the Caretaker Government in the Punjab to provide aid and assistance to the Commission and, in particular to comply with what has been set out in the present order, the Commission may make an appropriate representation to the Supreme Court for such consideration and orders as deemed appropriate.

Insofar as the general election to the KPK Assembly is concerned, counsel who entered appearance on behalf of the Governor of KPK Province withdrew from such appearance on account of a certain stand taken by a political party. The Governor, KPK Province therefore ceased to have representation before the Court. In such circumstances, the matter relating to the KPK Province is not adjudicated upon, with permission granted to the petitioners to file such petition and/or seek such relief before such forum as is deemed appropriate.

For the Petitioner(s):

Syed Ali Zafar, Advocate Supreme Court, Gohar Ali Khan, Advocate Supreme Court assisted by Syed Haider Ali Zafar, Advocate.

For the Federation:

Mansoor Usman Awan, Attorney General for Pakistan, assisted by Ms. Mehwish Batool Sardar, Advocate, Ch. Aamir Rehman, Addl. AGP., Malik Javed Iqbal

Wains, Addl. A.G., Hamood Uz Zaman Khan, Secretary Defence and Aamir Mehmood, Addl. Sec. Finance.

For ECP:

Sajeel Shehryar Swati, Advocate Supreme Court, Irfan Qadir, Advocate Supreme Court, Omer Hamid Khan, Sec. ECP., Zafar Iqbal Hussain, Spl. Sec. ECP., M. Arshad, DG Law ECP., Khurram Shehzad, ADG(L) ECP, Ms. Saima Tariq Janjua, Dy. Dir. ECP. and Falak Sher, Legal Consultant.

For Government of KPK:

Aamir Javed, AG KP and Mian Shafaqat Jan, Addl. AG KP.

For Government of Punjab:

Shangul, AG Punjab, (through Video Link from Lahore), Wasim Mumtaz Malik, Addl. AG Punjab, Sanaullah Zahid, Addl. AG and Barrister M. Mumtaz Ali, Addl. AG.

Dates of hearing: 27th, 28th and 29th, 30th, 31st March and 3rd April, 2023.

ORDER

For detailed reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise:

1. The impugned order dated 22.03.2023 ("EC Order") made by the Election Commission of Pakistan ("Commission") is declared to be unconstitutional, without lawful authority or jurisdiction, void ab-initio, of no legal effect and is hereby quashed. Neither the Constitution nor the law empowers the Commission to extend the date of elections beyond the 90 days period as provided in Article 224(2) of the Constitution.

2. The Election Programme notified by the Commission under section 57(2) of the Elections Act, 2017 on 08.03.2023 (vide notification No. F.2(3)/2023-Cord.) for the general election to the Punjab Assembly stands revived and restored immediately with, however, certain modifications. The need for the modifications arises for the following reason. On 22.03.2023, when the EC Order was made matters had reached up to stage 5 of the notified Election Programme. The EC Order unlawfully purported to withdraw the Election Programme. Thus, the remaining stages (Nos. 6 to 11) could not be given effect to. In the meanwhile 13 days have been lost on account of the unlawful order made by the Commission. In consequence thereof, the remaining stages have to be moved forward to take account of the lost period, and the Election Programme must be modified accordingly. We come to this conclusion with reluctance but consider it inevitable on account of the situation brought about by the EC Order. Therefore, the Election Programme will, in relation to stages Nos. 6 to 11, stand modified, and apply in the following manner:

6.	Last date for filing of appeals against decision of the Returning Officer	10.04.2023
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	rejecting/ accepting the nomination papers	
7.	Last date for deciding of appeals by the Appellate Tribunal	17.04.2023
8.	Publication of revised list of candidates	18.04.2023
9.	Last date for withdrawal of candidature and Publication of revised list of candidates	19.04.2023
10.	Allotment of Election Symbol to contesting candidates	20.04.2023
11.	Polling day	14.05.2023

3. In consequence thereof, the polling day perforce must be shifted, and moved forward from 30.04.2023 to 14.05.2023.

4. It is to be noted that on specific queries from the Court, the Commission categorically stated that if it was provided with necessary aid and assistance by the executive authorities in the Federation and the Provinces in discharge of their constitutional obligations under Article 220, then the Commission, notwithstanding everything set out in the recitals of the EC Order, would be able to organize and conduct the general elections to the Punjab and KPK Assemblies honestly, justly, fairly and in accordance with law, as required in terms of Article 218(3) of the Constitution. Therefore, the following further orders are made and directions given:

5. The Federal Government shall forthwith and in any case by 10.04.2023 release and provide to the Commission funds in the sum of Rs. 21 Billion for purposes of the general elections to the Punjab and Khyber Pakhtunkhwa Assemblies. The Commission shall, by 11.04.2023, file a report in the Court stating whether the said funds have been provided and received and if so, whether in full or in part. The report shall be placed before the members of the Bench for consideration in Chambers. If the funds have not been provided or there is a shortfall, as the case may be, the Court may make such orders and give such directions as are deemed appropriate to such person or authority as necessary in this regard. The Commission shall be entitled to utilize the funds in the first instance for the purposes of the general election to the Punjab Assembly. If there is thereafter a shortfall for purposes of the general election to the KPK Assembly, the Commission may make an appropriate representation to this Court for such consideration and orders as deemed appropriate.

6. The caretaker Cabinet that constitutes the Government of Punjab and, in particular, the Chief Secretary and the Inspector General Police of that Province must forthwith, and not later than 10.04.2023, provide a plan acceptable to the Commission for, inter alia, providing sufficient personnel for election-duty and security purposes for the holding of the general election. Furthermore, and in any case, the Government of Punjab and all officials thereof must, in discharge of

constitutional and legal duties and responsibilities, proactively provide all aid and assistance to the Commission for the holding and conduct of the general election.

7. The Federal Government must, in exercise of its powers and position in terms of Article 243(1) of the Constitution, and all other constitutional and legal powers enabling it in that behalf, and in discharge of its constitutional duties under Articles 148(3) and 220, provide all such aid and assistance to the Commission as required by it for the holding and conduct of the general elections to the Punjab and KPK Assemblies. Without prejudice to the generality of the foregoing, the Federal Government must make available all necessary personnel, whether from the Armed Forces, Rangers, Frontier Constabulary and all other forces under the direct, indirect or ultimate command and control of the said Government, as are required by the Commission for security and other purposes related to the general elections. In this regard, the Federal Government must forthwith, and not later than 17.04.2023, provide a plan acceptable to the Commission.

8. If there is a failure by the Federal Government or the Caretaker Government in the Punjab to provide aid and assistance to the Commission and, without prejudice to the generality of the foregoing, in particular to comply with what has been set out hereinabove, the Commission may make an appropriate representation to this Court for such consideration and orders as deemed appropriate.

9. Our attention has been drawn to certain matters that were pending in this Court (being S.M.C. 1/2023 and C.Ps. Nos. 1 and 2/ 2023) and which were heard and decided on 01.03.2023 by a five member Bench of the Court by a majority of 3:2 (Umar Ata Bandial, C.J. and Munib Akhtar and Muhammad Ali Mazhar, JJ; Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ dissenting). In particular, our attention has been drawn to the detailed reasons of the two learned Judges in minority (released on 27.03.2023), wherein it is, inter alia, stated that the said matters were decided (and dismissed) by a majority of 4:3. Respectfully, the position as claimed by the learned Judges in minority is erroneous and not sustainable in law.

10. Our attention has also been drawn to an order dated 29.03.2023 made in SMC 4/2022 by a majority of 2:1 by a learned three member Bench (Qazi Faez Isa and Aminuddin Khan, JJ; Shahid Waheed, J dissenting). The hearing of the present matter remained, and its decision by this Bench is, wholly unaffected by any observations made in the aforesaid majority order.

11. Insofar as the general election to the KPK Assembly is concerned, in relation to which the present petitioners have also sought relief, learned counsel who entered appearance on behalf of the Governor of KPK Province withdrew from such appearance on account of a certain stand taken by a political party which learned counsel was also representing. The Governor, KPK Province therefore ceased to have representation before the Court. In such circumstances, the matter relating to the KPK Province is not adjudicated upon, with permission granted to the petitioners to file such petition and/or seek such relief before such forum as is deemed appropriate.

MWA/M-14/SC Order accordingly.